NOTIFY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 1884CV00932

Notice cent
9/26/2019
J. H. T.
J. M. R-P.
J. K.
E. M.
R. P.

WILFRED DACIER

vs.

MASSACHUSETTS PAROLE BOARD & another[1]

(sc)

MEMORANDUM OF DECISION AND ORDER ON THE PARTIES' CROSS MOTIONS FOR JUDGMENT ON THE PLEADINGS

Wilfred Dacier ("Dacier") appeals from a decision of the Massachusetts Parole Board ("Board") denying his application for parole. The matter is presently before the court on the parties' cross motions for judgment on the pleadings. After hearing and careful review, for the following reasons, Dacier's motion is **ALLOWED**, and the Board's motion is **DENIED**.[2]

BACKGROUND

The following facts are taken from the administrative record.

On April 15, 1997, Dacier pleaded guilty to second-degree murder in connection with the stabbing death of his thirty-four-year-old sister, Susan Dacier ("victim").[3] He was sentenced to life imprisonment with the possibility of parole.

After Dacier was arrested but before he pleaded guilty, Dacier was admitted into Bridgewater State Hospital for suicidal ideation, where he remained until July 1998 when he was transferred to a Department of Correction ("DOC") facility. At some point, Dacier was diagnosed with Schizoaffective Disorder, which is manifested by paranoid ideation, depression

[1] Massachusetts Department of Mental Health.
[2] The Board also filed a motion to strike exhibits attached to Dacier's motion; however, because the court did not rely on those materials in reaching its decision, the court takes no action on the motion.
[3] At the time of the murder, Dacier was thirty-eight years old and lived with the victim in Lowell, Massachusetts.

and anxiety. While incarcerated, he has received daily medication and participates in psychiatric treatment as well as other programs available to him.

On November 23, 2010, the Board granted Dacier parole, noting that Dacier's "institutional adjustment has been excellent." However, the Board conditioned his parole on his admission to a secure Department of Mental Health ("DMH") facility, stating "no less restrictive setting would be compatible with the demands of public safety." Following the Board's decision, DMH evaluated Dacier and informed him that he was not eligible for its services because he did not have a "qualifying mental disorder" or "the current existence of a functional impairment that substantially interferes with or limits the performance of one or more major life activities . . . ." Dacier appealed DMH's decision; however, his appeal was denied. Because Dacier was unable to secure a placement in a DMH facility, in December 2013, the Board rescinded Dacier's parole.

Subsequently, on April 1, 2014, the Board held a review hearing, during which the Board extensively questioned Dacier about the relationship between his mental illness and the murder as well as his substance abuse history.[4] Following the hearing, the Board voted to postpone its decision pending a re-evaluation by DMH to determine what mental health services would be necessary and available to Dacier if he were released into the community. In its written decision, the Board acknowledged that there was a direct correlation between Dacier's undiagnosed, untreated mental illness and his decision to murder his sister; however, the Board noted its concerns regarding Dacier's current mental health status and his self-admitted need for structure, routine, and medication compliance in order to maintain his stability. The Board also stated that Dacier's "mental health needs appear to exceed that which the long-term residential treatment

[4] Dacier admitted to having abused alcohol and cocaine in the past but stated that he was not under the influence of drugs or alcohol on the day of the murder.

programs are able to provide." Following the Board's decision, DMH, once again, evaluated Dacier and concluded that he was not eligible for its services. As a result, on March 23, 2015, the Board voted to continue the action pending a mental health evaluation by forensic psychologist, Dr. Robert Kinscherff ("Dr. Kinscherff").

After Dr. Kinscherff evaluated Dacier, he issued a report, which states, in part:

> "Mr. Dacier's case illustrates the problems that can arise when applying DMH eligibility criteria which were devised for persons who will largely be served in the community and did not contemplate the circumstances of persons in the criminal justice system. Persons in the criminal justice system may be psychiatrically stabilized by the combined influences—often over years—of consistent access to supervised psychiatric medication, some degree of therapy services, and the high degree of structure/supervision of incarceration settings.
>
> By way of analogy, if a DMH client who is in the community goes into psychiatric crisis and requires acute and then continuing care state hospital admission, stabilization in an inpatient unit to a level of functioning that permits discharge back to the community does not trigger a determination that the DMH client is no longer eligible for DMH services as a result of stabilization while in hospital. Similarly, that Mr. Dacier has been stabilized as a result of psychiatric care . . . while incarcerated does not mean that he does not have a mental illness or that he is prepared to return without thoughtful transition and proactive supports to community placement and services after some two decades of incarceration and consistent mental health care."

Dr. Kinscherff opined that both public safety and Dacier would be best served if Dacier were to transition from incarceration to a DMH inpatient unit where he could continue to receive psychiatric care, gradually transition to lower levels of care/supervision in anticipation of community-based care, and case management planning. Dr. Kinscherff also recommended forwarding Dacier's case to the DMH Commissioner and Assistant Commissioner for Forensic Mental Health with a request for their review and consideration. However, Dr. Kinscherff also stated that in the event the DMH Commissioner or Assistant Commissioner were unwilling or unable to intervene, the Board should allow Dacier to transition gradually through minimum security followed by parole re-entry and other basic living and housing assistance programming.

On November 4, 2015, after having reviewed Dr. Kinscherff's report, the Board voted to postpone its decision pending a re-evaluation by DMH to determine Dacier's eligibility for DMH's services. The Board agreed to "assist in the process of having Dacier re-evaluated by DMH." It is unclear, however, what, if any, steps DMH took.

After the re-evaluation, DMH, not surprisingly, denied Dacier's request for services. As a result, on April 26, 2016, the Board concluded that Dacier had "not demonstrated a level of rehabilitative progress that would make his release compatible with the welfare of society," and denied parole with a one-year setback ("April 2016 decision"). Dacier subsequently appealed that decision, which was granted, and a new hearing was held in February 2017.

During the February 2017 hearing, Board members expressed their concerns regarding Dacier's need for a structured environment in order to maintain his stability. Ultimately, on November 13, 2017, the Board issued its decision denying Dacier parole with a three-year setback, stating that Dacier "admitted to unresolved anger issues" and that his release plan was not suitable in addressing his mental health needs and public safety ("November 2017 decision"). The Board also recommended that Dacier pursue an appeal to DMH. Dacier appealed the Board's decision, which was denied.

Thereafter, on March 23, 2018, Dacier filed this two-count complaint against the Board and DMH. Count 1 seeks judicial review pursuant to G. L. c. 249, § 4 of the Board's November 2017 decision. Dacier alleges that the Board's decision was arbitrary and capricious and in violation of state and federal anti-discrimination laws, including the Americans with Disabilities Act ("ADA"). Count 2 asserts a claim for declaratory relief against the Board and DMH for allegedly violating the ADA and Massachusetts anti-discrimination laws. DMH subsequently filed a motion to dismiss, which was denied; however, the court (Wilson, J.) severed and stayed

Count 2 pending the outcome of Dacier's administrative appeal. The court reasoned that unlike Count 2, Count 1 does not permit discovery. Therefore, in light of the court's decision, with respect to the present motion, Dacier only argues that the Board's decision was arbitrary and capricious and has reserved argument on the alleged disability discrimination for future litigation on Count 2. However, because the Board's alleged violations of Dacier's rights under the ADA and related state provisions are relevant to the disposition of the present motion, the court will address those allegations in the discussion below.

DISCUSSION

I. Standard of Review

Dacier seeks this Court's review of the Board's decision pursuant to G. L. c. 249, § 4. This statute provides for review in the nature of certiorari to correct claimed errors of law apparent on the record made in proceedings below that are not otherwise reviewable. *Bartlett v. Greyhound Real Estate Fin. Co.*, 41 Mass. App. Ct. 282, 290 (1996). The reviewing judge is confined to the record of the proceedings below, and may only correct "substantial errors of law apparent on the record adversely affecting material rights" (citation omitted). *MacHenry v. Civil Serv. Comm'n*, 40 Mass. App. Ct. 632, 634 (1996).

The standard of review that a court applies in a certiorari proceeding differs depending on the nature of the action for which review is sought. *Diatchenko v. District Attorney for Suffolk Dist.*, 471 Mass. 12, 31 (2015). Here, the proper standard of review is "abuse of discretion" as measured by the "arbitrary and capricious" test. *Id.* "A decision is not arbitrary and capricious unless there is no ground which reasonable [persons] might deem proper to support it." *T.D.J. Dev. Corp. v. Conservation Comm'n of N. Andover*, 36 Mass. App. Ct. 124, 128 (1994). See

Sierra Club v. Commissioner of the Dep't of Envtl. Mgmt., 439 Mass. 738, 748 (2003) (agency's decision is not arbitrary and capricious if it has a "rational basis").

The standards for parole hearings are set forth in G. L. c. 127, § 130. A prisoner may not be granted parole simply because he has exhibited good conduct. *Id.* Rather, parole is only appropriate when there is a reasonable probability that: (1) the prisoner will "live and remain at liberty without violating the law," and (2) "that his release is not incompatible with the welfare of society." *Id.* The Board is entrusted with the responsibility of determining if and when convicted persons may be appropriately released. *D'Urbano v. Commonwealth*, 345 Mass. 466, 476 (1963). To that end, the Board's determination when to grant parole is given "considerable deference." *Greenman v. Massachusetts Parole Bd.*, 405 Mass. 384, 387 (1989). However, that deference is not without limits. *Crowell v. Massachusetts Parole Bd.*, 477 Mass. 106, 112 (2017).

II. Analysis

While on the surface the Board's November 2017 decision does not appear whimsical or lacking of reason, when viewed in the context of Dacier's prior parole proceedings, the randomness becomes apparent. In 2010, the Board conditioned Dacier's release on his admittance into a DMH facility. However, that is a condition over which neither Dacier nor the Board has any control. Dacier cannot do anything to make DMH accept him, and likewise, the Board lacks authority to compel DMH to admit Dacier and provide him with services. Therefore, once the Board realized that DMH was not going to admit or provide services to Dacier, the Board then backtracked from its earlier findings presumably to justify holding Dacier in DOC custody year after year even though his mental condition or risk to community safety has not materially changed since the Board's 2010 decision granting him parole. As a result, Dacier

is in the midst of a "Catch-22," caught in a turf war between two state agencies, and there is nothing he can do to make himself a more suitable candidate for DMH services.

Because Dacier's release into the community is wholly dependent on an external entity that is a stranger to these proceedings, the court finds that the Board has acted in an arbitrary manner by setting up a process that Dacier cannot accomplish or control. The longer and longer periods between scheduled parole hearings serve not to reform or rehabilitate Dacier; it simply warehouses him until some future date when perhaps DMH will relent. However, Dacier's mental illness is durable, not transient; therefore, when he next appears before the Board, he merely will be an older version of himself – one who still suffers from a mental illness requiring services and community care.

Furthermore, the court also finds that the Board's November 2017 decision was arbitrary in light of applicable federal and state anti-discrimination laws. The ADA and related state provisions "prohibit the same conduct: disabled persons may not be 'excluded from participation in or be denied the benefits of' services, programs, or activities [of a public entity], and they may not 'be subjected to discrimination'" (citation omitted).[5] *Id.* at 112, quoting *Shedlock v. Department of Corr.*, 442 Mass. 844, 854 (2004). See *Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 210 (1998) (ADA applies to prisoners). See also *Thompson v. Davis*, 295 F.3d 890, 896-897 (9th cir. 2002), cert. denied, 538 U.S. 921 (2003) (ADA applies to parole proceedings, including substantive decision-making). Accordingly, the Board "may not categorically exclude any prisoner [from parole] by reason of his or her disability[,]" and "both

[5] To prove that the Board violated the ADA and cognate state provisions, Dacier first must establish that he is a "qualified individual with a disability" as defined in 42 U.S.C. § 12131(2). Although Dacier reserved argument on this issue, there is ample evidence contained in the administrative record from which the court finds that Dacier has met that burden.

the ADA and the parole statute, G. L. c. 127, § 130, require the board to take some measure to accommodate prisoners with disabilities" (citation omitted). *Crowell*, 477 Mass. at 112.

Where, as here, the Board has become aware that a prospective parolee's disability could affect his ability to qualify for parole, the Board must determine whether reasonable modifications could enable him to qualify for parole without changing the fundamental nature of parole. *Id.* at 113. For example, where the Board is aware that a mental disability may affect a prisoner's ability to prepare an appropriate release plan, the Board should make reasonable modifications to its policy by providing an expert or other assistance to help the prisoner identify appropriate post-release programming. *Id.* at 112. It "should also consider whether there are risk reduction programs designed to reduce recidivism in those who are mentally disabled." *Id.* at 112-113.

It appears that the only modification the Board made in light of Dacier's disability, was to enlist Dr. Kinscherff for an evaluation; however, based on the record, the court can infer that that modification, alone, is not reasonable. As stated in Dr. Kinscherff's report, Dacier's case demonstrates the problems that can arise with DMH's eligibility criteria when a prisoner with a mental illness is seeking services but is psychiatrically stable due to decades of strict supervised care and treatment by the DOC. In light of that predicament, Dr. Kinscherff suggested that Dacier's case be referred directly to the DMH Commissioner or Assistant Commissioner for intervention. However, it does not appear from the record that the Board ever assisted in that process; nor does it appear that the Board took other steps to assist Dacier in identifying alternative release programs that may be suitable for him. See *id.* at 114 n.15 ("To the extent that the plaintiff's disability prevents him from seeking out such reasonable modifications himself, it may be inappropriate for the board to place the burden on him to put forward his own parole

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programming proposal."). Rather, the Board summarily denied Dacier parole on the ground that his release plan is "not suitable."[6] As a result, Dacier is at a bureaucratic impasse with no end in sight, and thus, is being penalized further by simply having a mental illness.[7]

Accordingly, by failing to make reasonable modifications to its policy, the Board did not comply with its obligations under the ADA and related state provisions. Therefore, the November 2017 decision is arbitrary and capricious, and Dacier is entitled to a new hearing, at which time the Board must determine whether *reasonable* modifications could enable him to qualify for parole. See *id.* at 114 n.17.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that Dacier's motion for judgment on the pleadings is **ALLOWED**, and the Board's cross motion is **DENIED**.

It is further **ORDERED** that Count 2 will be stayed pending Dacier's parole hearing.

September 25, 2019

Rosemary Connolly
Justice of the Superior Court

[6] To the extent that the Board based the November 2017 decision on Dacier's purported admission to "unresolved anger issues," the administrative record is entirely devoid of such admission. At no point during the hearing, did Dacier admit to unresolved anger issues. Rather, when one Board member asked Dacier how he has addressed his anger issues, he gave an example involving a dispute with his roommate over the television and window in their bunk. The Board member responded with approval, stating that it sounded as if Dacier had effectively addressed his anger issues. Furthermore, when Dacier spoke about his behavior towards his mother and the victim, those statements related to his behavior before his diagnosis and treatment. Therefore, the Board's reliance on those statements is misplaced. Accordingly, because there is no basis upon which the Board could find that Dacier admitted to unsolved anger issues, its decision in that regard is arbitrary and capricious.

[7] It also appears that Dacier is being penalized for appealing the Board's decisions. In its April 2016 decision, the Board ordered a one-year setback; however, after he successfully appealed that decision, the Board ordered a three-year setback in its November 2017 decision. Because there is no evidence that Dacier decompensated in the interim, the Board's decision to increase his setback period, without explanation, seems punitive.